

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BITH, LLC,

Plaintiff and Appellant,

v.

RAMIN MIKAIL,

Defendant and Respondent.

B228808

(Los Angeles County
Super. Ct. No. BC 379597)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Elizabeth Allen White, Judge. Affirmed.

Urtnowski & Associates, J. Brian Urtnowski, Lisamarie Graham and Jered T. Ede
for Plaintiff and Appellant.

Law Offices of Deborah De Niro, Deborah De Niro; The Ehrlich Law Firm and
Jeffrey Isaac Ehrlich for Defendant and Respondent.

* * * * *

BITH, LLC (BITH) appeals from a judgment of dismissal following the sustaining of a demurrer of respondent Ramin Mikail to the third amended complaint without leave to amend. BITH contends it sufficiently pleaded causes of action against Mikail for conversion, unjust enrichment and constructive trust. We disagree and therefore affirm the judgment.

FACTS¹

This appeal arises from a complicated web of alleged fraud.² On or about June 6, 2007, BITH's manager was approached by certain defendants, who told BITH that Henrik Sardariani (Sardariani) was looking for a short-term loan of \$2.5 million. BITH was told that Sardariani was purchasing a medical hospital in Los Angeles County for \$30 million and needed a \$2.5 million loan to qualify for an extension of the hospital escrow or risk forfeiting a \$3 million deposit he had made on the hospital transaction. In truth, the hospital purchase by Sardariani was fraudulent, and real property Sardariani proposed to use to secure the \$2.5 million loan did not exist.

BITH was told the \$2.5 million loan would be placed in a secure escrow account for 30 days and, in exchange for the loan, Sardariani would pay BITH a \$500,000 loan fee/broker commission for the short-term loan.

Another defendant introduced BITH's manager to defendant Michael Young, who provided BITH with a copy of an executed hospital purchase contract purportedly evidencing the sale of the hospital to Sardariani. The documents indicated that defendant

¹ Because this case comes to us after entry of a judgment based on the sustaining of a demurrer, we accept as true the material allegations of BITH's pleadings. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 7; *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 401.) However, we do not assume the truth of contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

² We previously reversed a judgment of dismissal in favor of a different defendant, Downey Savings and Loan Association (Downey Savings), after the trial court sustained Downey Savings' demurrer to the first amended complaint without leave to amend. (*BITH, LLC v. Downey Savings and Loan Assn.* (Sept. 29, 2010, B210007 [nonpub. opn.])

Axcess Escrow was the escrow company being used for the hospital purchase. Young provided BITH with a false accounting prepared by Downey Savings that purported to show Sardariani had more than \$3 million in an escrow account maintained by Axcess Escrow at Downey Savings. In reality, Sardariani had put down no deposit for the purchase of the hospital, and the hospital purchase contract and accounting were fraudulent. Young also falsely told BITH that Sardariani had \$750,000 in “verifiable” funds in an account that would guarantee the safety of BITH’s \$500,000 loan fee, when, in fact, no such funds existed. Young also provided BITH with a fraudulent financial statement for Sardariani showing he had a net worth of about \$20 million.

On or about June 11, 2007, BITH entered into an escrow funding agreement with Sardariani. Under the agreement, BITH agreed to lend \$2.5 million to Sardariani subject to conditions including that the loan escrow would be in the exclusive control of BITH, the escrow agent would be selected by BITH and the money and loan fees would be returned or paid to BITH within approximately three weeks. However, the escrow funding agreement was modified before it was signed to insert Axcess Escrow as the applicable escrow company because it was supposedly already handling the hospital sale. BITH deposited \$2.5 million by wire transfer into Downey Savings for deposit to the account of Axcess Escrow.

Axcess Escrow maintained no account at Downey Savings, and Downey Savings had no account identified with the name “Axcess Escrow.” Nevertheless, Downey Savings accepted the \$2.5 million wire transfer and deposited the amount in the account of Axcess Mortgages, “an entity separate a[nd] distinct from Axcess Escrow.”

Under the escrow funding agreement, Sardariani was required to deposit his \$500,000 lender’s fee into Axcess Escrow’s account by June 13, 2007. Although BITH was assured by other defendants that Sardariani had deposited the lender’s fee with Downey Savings, BITH never received any documentation confirming the deposit. In truth, Sardariani never actually made the deposit. On June 12, 2007, Downey Savings was instructed to wire \$1.9 million of the deposited money to a bank account in Hong Kong controlled by Sardariani and another defendant, Chris Woods. Woods and another

defendant allegedly directed the wire transfer of the remaining \$600,000 to domestic bank accounts controlled by Mikail and other defendants.

Subsequently, Sardariani informed BITH that he had used \$600,000 of the money he obtained from BITH to pay back preexisting debts owing from Sardariani to Mikail and other defendants and he had told them the funds were coming from an escrow account at Downey Savings funded by BITH that were supposed to be used for the hospital purchase transaction.

Allegedly, when Mikail and the others “agreed to accept” funds stolen from BITH (stolen funds), they knew the money “had been stolen, or was to be stolen[,] from BITH.”

PROCEDURAL HISTORY

BITH filed the present action on October 23, 2007, against Sardariani and defendants other than Mikail. The trial court sustained a demurrer to the complaint, with leave to amend. BITH filed a first amended complaint and then added Mikail as a “Doe” defendant on May 20, 2008. Before Mikail could respond to the first amended complaint, BITH filed a second amended complaint including Mikail as a named defendant.

The second amended complaint purported to allege against the various defendants some 17 causes of action. As against Mikail, BITH asserted claims for fraud, conspiracy, conversion, violation of Penal Code section 496 (receipt of stolen property), constructive trust, common counts and unjust enrichment.

Mikail generally and specially demurred to all seven of the causes of action asserted against him in the second amended complaint. The trial court sustained Mikail’s demurrer and granted leave to amend, indicating that BITH was entitled to an opportunity to “clean . . . up” the pleading. However, the court expressed “grave concerns” regarding the causes of action against Mikail noting “his name is just sort of thrown in there.”³

³ The court stated, “As I understand this, this was just money transferred into an account. That’s all I know. I don’t know whether they ever met. I don’t know if they ever talked. I don’t know if there was any agreement. [¶] . . . [¶] . . . Throwing

BITH filed a third amended complaint. As against Mikail, BITH asserted claims for conversion, receipt of stolen property in violation of Penal Code section 496, constructive trust premised on conversion, and unjust enrichment. BITH alleged that Mikail and other defendants participated in the theft of BITH's money by "agreeing to accept BITH's stolen funds, knowing the same to be stolen, as payments for debts allegedly owing from defendant Sardariani to these defendants" and by "knowingly accepting" receipt of BITH's stolen funds wired into their accounts. Mikail and other codefendants allegedly "knew that this money had been stolen, or was to be stolen from BITH." BITH further alleged that Mikail and other defendants "improperly retained" BITH's stolen money after a demand was made for its return.

Mikail generally and specially demurred to the third amended complaint. The trial court sustained Mikail's demurrer to the claims for conversion, constructive trust and unjust enrichment without leave to amend.

As to conversion, the court noted the third amended complaint simply alleged that other named defendants wrongfully wired BITH's funds into the bank account of Mikail, among others. BITH alleged the other named defendants did so in order to pay a preexisting debt that they owed to Mikail. The only wrongful conduct alleged to have occurred as to Mikail is that he "participated in the theft of [BITH's] money and in the conspiracy by *agreeing to accept* the funds." (Italics added.) Because BITH's claims for constructive trust and unjust enrichment were based on the conversion claim, the court determined those causes of action also failed.

However, as to the claim of receiving stolen property in violation of Penal Code section 496, the court determined that BITH's allegations that Mikail received the funds via a wire transfer from some of the other named defendants and agreed to accept the stolen funds knowing they were stolen were sufficient to state a cause of action. The court accordingly overruled Mikail's demurrer to that cause of action.

someone's name in does not mean that you're going to get past a demurrer. I need to know who this guy is. What did he do? What are the allegations?"

BITH voluntarily dismissed with prejudice the claim for receipt of stolen property under Penal Code section 496 on August 27, 2009.⁴ On October 19, 2010, the trial court entered a first amended judgment in favor of Mikail and against BITH. This timely appeal ensued.

STANDARD OF REVIEW

On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, the standard of review is de novo, i.e., the reviewing court must exercise its independent judgment on whether the complaint states a cause of action. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595; *Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) In reviewing the complaint, the court assumes the truth of all well pleaded facts as well as those subject to judicial notice. (*Aguilera*, at p. 593, fn. 1.) If the complaint states a cause of action under any theory, the complaint is good against a general demurrer. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.)

Ordinarily, it is an abuse of discretion to sustain a general demurrer to a complaint without leave to amend if there is a reasonable possibility the defect in the complaint can be cured by amendment. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) The burden is upon the plaintiff to demonstrate the manner in which the complaint might be amended and how that amendment would change the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 (*Goodman*); *Carter v. Prime Healthcare Paradise Valley LLC*, *supra*, 198 Cal.App.4th 396, 411.)

DISCUSSION

1. Conversion

BITH asserts the trial court improperly sustained Mikail's demurrer to the claim for conversion, arguing that knowledge on the part of a defendant is not a required

⁴ Mikail asserts in his respondent's brief that BITH dismissed the Penal Code section 496 claim in exchange for a waiver of costs and of the right to sue BITH for malicious prosecution. BITH has not asserted otherwise.

element for conversion and that BITH properly pleaded Mikail's wrongful conduct. We disagree.

Conversion is the wrongful exercise of dominion over the property of another. (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 451 (*Zerin*).) The elements of a claim for conversion are (1) the plaintiff's ownership or right to possession of the property at the time of the conversion, (2) the defendant's conversion by a wrongful act or disposition of property rights, and (3) damages. (*Ibid.*) It is not necessary that there be a manual taking of the property, only an assumption of control or ownership over the property, or that the alleged converter has applied the property to his or her own use. (*Id.* at pp. 451-452.) A mere contractual right of payment, without more, is insufficient. (*Id.* at p. 451.)

Upon analysis, we conclude the trial court correctly ruled that BITH failed to state a cause of action for conversion against Mikail.

A. Specifically Identifiable Funds

"A cause of action for conversion of money can be stated only where a defendant interferes with the plaintiff's *possessory interest* in a specific, identifiable sum, such as when a trustee or agent misappropriates the money entrusted to him." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 284, and cases there cited.) Unless there is a specific, identifiable sum involved, such as when an agent accepts a sum of money to be paid to another and fails to make the payment, money cannot be the subject of a cause of action for conversion. (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491; see also *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 (*PCO, Inc.*).)

Despite numerous opportunities to state a claim, BITH in its third amended complaint failed to show it had title to specific, identifiable funds that it claims were converted. The "escrow funding agreement" between BITH and Sardariani, which BITH attached to the third amended complaint, states that BITH would deposit funds with Axxess Escrow, which is then defined in the agreement as "Escrow." No reference is made in the agreement as to what Sardariani or Axxess Escrow was permitted or not

permitted to do with the funds, which BITH alleges was a \$2.5 million “loan” from BITH.

There is no mention in the agreement of how the funds would be held by Axxess Escrow and no mention of Downey Savings at all. In particular, there is no prohibition against Axxess Escrow commingling BITH’s funds with other funds held by Axxess Escrow, nor any statement that any deposit of escrow funds at Downey Savings could not be commingled with deposits made by Downey Savings’ other depositors. Whether Axxess Escrow was obliged to hold the \$2.5 million in a specific, separate account once the wire transfer was made is significant because of the nature of the relationship between a bank and its depositor.

In *Chazen v. Centennial Bank* (1998) 61 Cal.App.4th 532, 537, the court explained: “It has long been regarded as “axiomatic that the relationship between a bank and its depositor arising out of a general deposit is that of a debtor and creditor.” [Citation.] “A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such.” [Citation.]’ [Citation.] Accordingly, banks ‘are not fiduciaries for their depositors.’ [Citation.]” A general deposit, such as the deposit allegedly made to the account of Axxess Escrow at Downey Savings, is in effect a loan to the bank, payable on demand by the depositor. (*Morse v. Crocker National Bank* (1983) 142 Cal.App.3d 228, 232.) “Title to the deposited funds passes immediately to the bank which may use the funds for its own business purposes. [Citations.] The bank does not thereby act as trustee and cannot be charged with converting the deposit to its own use. [Citations.]” (*Ibid.*) The bank is only “obligated to pay the debt reflected by the balance of the deposited funds upon its depositor’s demand.” (*Ibid.*)

A general deposit is to be distinguished from a special deposit or a deposit for a special purpose.⁵ A deposit in a bank is general in the absence of an agreement or

⁵ In the case of a special deposit or a deposit for a special purpose, the depositor retains ownership of the funds and the transaction results in a trust or fiduciary relationship. (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 860; *Bank of America v. Board of Supervisors* (1949) 93 Cal.App.2d 75, 79.)

understanding that it should be special or circumstances that give the transaction the nature of a special deposit. (*Bank of America v. Board of Supervisors*, *supra*, 93 Cal.App.2d at p. 79.) No such agreement, understanding or special circumstance is alleged here.

Title to the funds thus presumably passed to Downey Savings when the funds were deposited. Absent any showing to the contrary, the funds were then commingled with the funds of other depositors and used in the bank's general banking operations. The third amended complaint alleged that a conversion by Mikail purportedly occurred on June 12, 2007, when \$600,000 of the funds deposited with Downey Savings was purportedly wired by Axxess Escrow to accounts controlled by Mikail and other defendants.⁶ Thus, the third amended complaint failed to show BITH had title to specific, identifiable funds that were purportedly converted to Mikail's use.

B. Immediate Right to Possession

The third amended complaint lacks another essential element of the tort of conversion, i.e., a showing that BITH had an immediate right to possession of the thing converted at the time when the alleged conversion occurred. (*Zerin*, *supra*, 53 Cal.App.4th at p. 451.) BITH provided funds to Axxess Escrow, which is alleged to have

⁶ In its reply brief, BITH claims it alleged in its first amended complaint that Sardariani gave "not less than \$500,000 of those stolen funds" to Mikail and that Sardariani "wired Mikail not less than \$500,000 of BITH's money" one day after BITH transferred the \$2.5 million into an escrow account with Axxess Escrow. (Italics added.) However, the first amended complaint actually alleged in numerous places that other defendants "wired . . . \$600,000.00 to domestic banks [*sic*] accounts controlled by defendants Nissan, Mikail and Goldman." (Italics added.) Thus, even the amount of funds allegedly transferred appears to be undetermined, providing additional reason why BITH's pleading insufficiently showed any claim for conversion. (*Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 235 [plaintiffs failed to identify specific, identifiable sums that card club took from them as result of cheating by other players]; *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.* (1996) 49 Cal.App.4th 472, 485 [money allegedly misappropriated "over time, in various sums" from partnership accounts]; see *PCO, Inc.*, *supra*, 150 Cal.App.4th at p. 397 [plaintiffs could only estimate amount of cash contained in unknown number of bags removed from residence].)

deposited the funds into an account at Downey Savings. As we have explained, *ante*, because that was a general deposit, title to the funds passed to Downey Savings, and the depositor became the bank's creditor in the amount of the deposit. However, "a mere contractual right of payment, without more, will not suffice" for the tort of conversion. (*Id.* at p. 452.) The third amended complaint repeatedly characterizes the nature of BITH's contract with Sardariani as a "loan" or a "short-term loan." The "escrow funding agreement" between BITH and Sardariani defined the term of the loan as extending from June 8, 2007, through June 29, 2007, and BITH allegedly loaned Sardariani \$2.5 million on June 8, 2007, with the expectation that it would be repaid in full, with an additional \$500,000 as a "loan fee" on June 29, 2007.

Under the terms of the alleged escrow funding agreement, as of June 12, 2007 (the date money was allegedly transferred into Mikail's bank account), BITH had no right to immediate possession of the funds it had loaned to Sardariani, merely an expectancy of repayment in the future. Because BITH lacked the right to immediate possession on the date the funds purportedly were "converted" by Mikail, no cause of action for conversion was stated under the alleged facts.

C. Wrongful Act

The trial court correctly noted that a conversion claim requires a wrongful act by the defendant at the time of the conversion, not merely a passive receipt of funds into an account.⁷ On appeal, BITH asserts that an allegation that Mikail agreed to accept the funds, "knowing the same to be stolen," sufficiently pleaded wrongful conduct on the part of Mikail.⁸ (Boldface and underscoring omitted.) We disagree.

⁷ The trial court observed that "[c]onversion requires a wrongful conduct at the beginning, which results in [the defendant's] holding the property. I don't see that."

⁸ The trial court ruled such allegations were sufficient, however, to allege Mikail's receipt of stolen property, overruling Mikail's demurrer to the claim for violation of Penal Code section 496. (See 2 Witkin, Cal. Crim. Law (3rd ed. 2000) Crimes Against Property, § 81, p. 110; *People v. Scaggs* (1957) 153 Cal.App.2d 339, 352 [under California's broad statute, "even though a person is not aware that property is stolen when he first comes into possession of it, if he subsequently learns of its stolen nature

BITH's allegation in the third amended complaint that Mikail "knew" the money transferred into his account had been stolen from BITH is a barren conclusion unsupported by allegations of fact. And, our attention has been drawn to nothing in the third amended complaint or incorporated exhibits to support a finding that Mikail engaged in wrongful conduct supporting a claim for conversion. On appeal, BITH relies on *Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539 (*Oakdale*) in arguing that Mikail can be held jointly liable with Sardariani for the conversion of BITH's money because his acceptance of BITH's stolen money was part of a conspiracy to perpetrate a fraudulent scheme. We find *Oakdale* unpersuasive as applied to the present facts.

In *Oakdale*, Wang, a partner in a venture, sold a note belonging to the partnership without authorization. Wang then tendered the proceeds of the sale of the note to Fong, in payment of a prior debt Wang owed Fong. (*Oakdale, supra*, 43 Cal.App.4th at pp. 542-543.) The partnership sued Fong for conversion, and Fong asserted he was an innocent purchaser for value and had no actual knowledge that Wang was without authority to sell the partnership's property. (*Id.* at pp. 548-549.) The appellate court held that Fong could not rely on this defense because Fong was not a purchaser for value. The only "value" Fong gave in exchange was the forgiveness of a preexisting debt, and that debt was owed by Wang personally, not the partnership. Moreover, Fong had constructive knowledge of the rights of the other partners as the same partnership agreement Fong reviewed to determine whether Wang had authority to dispose of the note also referred to Wang's other partners.⁹ (*Id.* at pp. 547-549.) Here, Mikail is not relying on the defense that he was an innocent purchaser for value.

and then conceals or withholds it from its true owner, he is guilty of a violation"].) However, as noted previously, BITH later voluntarily dismissed that claim in August 2009 eliminating the sole remaining cause of action against Mikail.

⁹ Even the appellate court in *Oakdale* noted, "we do not find Fong automatically liable for conversion stemming from his *receipt* of converted funds." (*Oakdale, supra*, 43 Cal.App.4th at p. 546, italics added.)

BITH's allegation that Mikail "knew" the money transferred into his account had been stolen from BITH is a naked conclusion or contention, not a factual allegation. A mere receipt of funds without more fails to constitute an "act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." (*Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 812.) To establish conversion, the plaintiff "must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property." [Citation.] Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort. [Citation.]" (*Ibid.*) The third amended complaint does not show that Mikail took any affirmative act with respect to the funds deposited into his account. It fails to show any intentional, wrongful act of dominion exercised by Mikail over BITH's property.

The trial court therefore properly dismissed the conversion cause of action.

2. Constructive Trust

BITH asserts that the trial court sustained Mikail's demurrer as to the claim for constructive trust solely because the claim was premised upon its claim for conversion. BITH argues that because the conversion claim was properly pleaded the trial court erred in sustaining the demurrer with respect to constructive trust. BITH further asserts that the claim for constructive trust was sufficient in that BITH alleged (1) facts constituting the underlying cause of action and (2) specific identifiable property to which "defendant has title." We disagree.

A constructive trust is not a true trust but rather an equitable remedy for a plaintiff who seeks recovery of specific property premised on fraud, breach of fiduciary duty or other act entitling the plaintiff to some relief. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 840, p. 255; *Bainbridge v. Stoner* (1940) 16 Cal.2d 423, 428-429.) A constructive trust may be imposed when there is a wrongful acquisition or detention by the defendant of property to which the plaintiff is entitled. (*Zerin, supra*, 53 Cal.App.4th at p. 457; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 600.) A plaintiff must plead some

underlying cause of action, such as fraud, breach of fiduciary duty, breach of promise to buy property for the plaintiff or other basis for recovery that entitles the plaintiff to relief. (See Witkin, *supra*, at p. 255; *Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1114.)

Here, BITH expressly based its cause of action for constructive trust, as applied to Mikail, on its cause of action for conversion. The third amended complaint states that “BITH is entitled to a constructive trust against . . . Mikail . . . based on the allegations contained in BITH’s Fourth Cause of Action for Conversion” The claim for conversion was the only basis on which BITH premised its constructive trust cause of action against Mikail.

The trial court properly determined that BITH failed to state any claim for conversion against Mikail, and therefore Mikail had no obligation to hold the purportedly converted funds in trust for BITH. (*Zerin, supra*, 53 Cal.App.4th at p. 457.)

3. Unjust Enrichment

As with a claim for constructive trust, there is no cause of action in California for unjust enrichment as such. “Unjust enrichment” is not a remedy in itself but the result of a failure to make restitution under circumstances where it is equitable to do so. (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793.) It is synonymous with restitution. (*Ibid.*) “Under the law of restitution, ‘[a]n individual is required to make restitution if he or she is unjustly enriched at the expense of another. [Citations.] A person is enriched if the person receives a benefit at another’s expense. [Citation.]’” (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 389, quoting *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662.) “[R]estitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory (an election referred to at common law as ‘waiving the tort and suing in assumpsit’). [Citations.]” (*McBride, supra*, at p. 388.) Only if the circumstances are such as to make it unjust for the benefited person to retain the benefit is restitution required. (*Id.* at p. 389.)

In the present action, BITH's cause of action for unjust enrichment had the same factual basis as its cause of action for conversion, and the trial court apparently found dismissal of the conversion claim made dismissal of the unjust enrichment claim appropriate as the circumstances were not such as to compel restitution.

Even if the cause of action for receipt of stolen property under Penal Code section 496 might have supported an unjust enrichment claim, BITH could not have been prejudiced by the court's sustaining of the demurrer as to unjust enrichment, as BITH subsequently voluntarily dismissed the section 496 claim with prejudice.

4. Leave to Amend

BITH asserts that the trial court abused its discretion by failing to provide it with a chance to amend its claims against Mikail. BITH argues that the trial court should have allowed it an opportunity to plead that "Mikail knowingly participated in the conversion of BITH's funds," and that "Mikail's participation was wrongful in that such conversion was done at Mikail's request to allow Sardariani to repay Mikail." Although BITH asserts the third amended complaint was only its second attempt to state claims against Mikail, this was BITH's fourth attempt to state viable claims against the various defendants to recoup its loss.¹⁰ BITH listed Mikail as a named defendant in the second amended complaint, adding his name to its claims of fraud, conspiracy, violation of Penal Code section 496, unjust enrichment, conversion, common counts and constructive trust.

In sustaining Mikail's demurrer to the second amended complaint, the trial court cautioned BITH of its "grave concerns" over Mikail's inclusion as a defendant, stating it appeared Mikail was "just sort of thrown in there." Mikail's counsel noted that the only factual allegation made against Mikail in BITH's 100-page complaint was the allegation that money was transferred from a general bank account into the accounts of three people, one of whom was Mikail. That single allegation formed the basis for all of

¹⁰ Actually, because BITH originally named Mikail as a Doe defendant in the first amended complaint, BITH has had three opportunities to state a cause of action against Mikail.

BITH's purported claims against Mikail. In allowing BITH an opportunity to file a third amended complaint, the court specifically warned BITH: "Throwing someone's name in [a complaint] does not mean that you're going to get past a demurrer. . . . [¶] . . . [¶] . . . I need to know the facts. Did Mikail participate in some sort of a meeting? Was there some sort of agreement? If so, what was it?" The court made clear if Mikail was to be kept in the case BITH needed to alleged facts that clearly spelled out his role in the case, beyond simply owning a bank account into which some money was deposited.

In the third amended complaint, among other things, BITH abandoned its claims against Mikail for fraud and conspiracy and dropped his name from the list of defendants who allegedly had a role in defrauding it. All BITH offered in the pleading, however, was a factually unsupported contention that Mikail "knew" the funds deposited into his account was stolen. BITH failed to request a further opportunity to amend and failed to indicate in what manner the pleading could be amended if leave were granted. Based on the totality of circumstances, the trial court did not abuse its discretion in denying BITH leave to amend.

On appeal, BITH asserts that the deficiencies of its pleading can readily be cured by a "minimal" amendment. BITH correctly argues that, even when no request to amend was made in the trial court, it is an abuse of discretion not to grant leave to amend if there is any reasonable opportunity the defect can be cured by amendment. (*Goodman, supra*, 18 Cal.3d at p. 349.)

BITH claims in its opening brief that it could amend the pleading simply by stating that Mikail "knowingly participated" in the conversion of BITH's funds and such participation was wrongful in that it "was done at Mikail's request to allow Sardariani to repay Mikail." Such allegations, however, merely restate conclusions that we have found wanting, not facts.

In its reply brief, BITH asserts the deficiencies could be resolved by an amendment "clarifying" the causes of action asserted against Mikail. Such assurances fail to satisfy BITH's burden of specifically showing in what manner the pleading can be

amended and “how that amendment will change the legal effect of [its] pleading.”
(*Goodman, supra*, 18 Cal.3d at p. 349.)

DISPOSITION

The judgment is affirmed. Mikail is to recover costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.